



**Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Telephone Surcharge - State of Alaska

**File:** B-259029

**Date:** May 30, 1995

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### **DIGEST**

The federal government is constitutionally immune from paying the 911 emergency telephone surcharge imposed by the state of Alaska because the surcharge is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services.

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### **DECISION**

An authorized certifying officer of the Department of Agriculture's National Finance Center has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying the 911 emergency telephone surcharge assessed against federal agencies in the state of Alaska. For the reasons set forth, we conclude that the surcharge is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from the tax.

#### **Background**

Under section 29.35.131(a) of the Alaska Statutes, municipalities in the state are authorized to impose a 911 surcharge on each "local exchange access line"<sup>1</sup> to meet the needs of an enhanced 911 system.<sup>2</sup> The charge may not exceed seventy-five cents per month for each access line, depending on the population of the municipality. The local

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<sup>1</sup>"Local exchange access line" is defined as "a telephone line that connects a local exchange service customer to the local exchange telephone company switching office and has the capability of reaching local public safety agencies." Alaska Stat. § 29.35.137(4).

<sup>2</sup>An "enhanced 911 system" is defined to mean "a telephone system consisting of network, database, and enhanced 911 equipment that uses the single three digit number, 911, for reporting a police, fire, medical, or other emergency situation, and that enables the users of a public telephone system to reach a public safety answering point to report emergencies by dialing 911." Alaska Stat. § 29.35.137(3).

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exchange telephone company<sup>3</sup> is required to bill the telephone customers for the surcharge and must remit the amount collected to the municipality no later than sixty days after the end of the month in which the amount was collected. Alaska Stat. § 29.35.131(d). The municipality must use the funds collected from the imposition of the surcharge only for the enhanced 911 system. Alaska Stat. § 29.35.131(a).<sup>4</sup>

### Analysis

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments.<sup>5</sup> Direct taxation occurs where the legal incidence of the tax falls directly on the United States as the buyer of goods, Kern--Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), or as the consumer of services, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. County of Allegheny, 322 U.S. 174 (1944). These direct taxes, known as "vendee" taxes, are not payable by the federal government unless expressly authorized by Congress. 64 Comp. Gen. 655, 656-57 (1985).

We recently examined 911 charges in Wyoming, B-255092, Feb. 14, 1994; Pennsylvania, B-253695, July 28, 1993; and Indiana, B-248363, Apr. 17, 1992.<sup>6</sup> We

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<sup>3</sup>A "local exchange telephone company" is defined as "a telephone utility certified by the Alaska Public Utilities Commission to provide local exchange service." Alaska Stat. § 29.35.137(6).

<sup>4</sup>The certifying officer has also provided us with a copy of a borough's ordinance which was enacted pursuant to Alaska's 911 statute. The Matanuska - Susitna Borough Ordinance is consistent with the state statute and requires in section 3.38.040, for example, that the local telephone companies collect the surcharge from its customers and remit the amount collected to the borough no later than sixty days after the end of the month in which it was collected.

<sup>5</sup>Although the Alaska statute labels the 911 telephone charge as a "surcharge," it is, nonetheless, a tax. In 65 Comp. Gen. 879, 881 (1986), we identified the characteristics of telephone charges which make them taxes. First, the telephone service is provided by a local government or by a quasi-governmental unit. Second, public funding of the service requires legal authority, e.g., an ordinance or referendum. Third, the service charge is actually based on a flat rate per telephone line and is unrelated to levels of service. The 911 surcharge assessed under the Alaska statute satisfies all these criteria. For further discussion of the characteristics of taxes, see, e.g., In Re Mytinger, 31 F. Supp. 977 (N.D. Tex. 1940); Mich. Employment Sec. Comm'n v. Pratt, 144 N.W. 2d 663, 664-65 (Mich. App. 1966).

<sup>6</sup>See also 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-249007, Jan. 19, 1993 (Nebraska); B-246517, Apr. 17, 1992 (Kentucky).

held, in these cases, that the 911 surcharges at issue were vendee taxes not payable by the federal government. Under these state statutes, the telephone companies were merely collection agents, i.e., required to collect the 911 charges from their customers and then remit the amount collected to the state taxing authorities. Cf. B-238410, Sept. 7, 1990. The Wyoming statute, for example, makes clear that "[e]very billed service user shall be liable for any charge imposed under this chapter until it has been paid." Wyo. Stat. § 16-9103(e).

The Alaska statute is not materially different from the Wyoming statute. Under Alaska's statute, the telephone company acts as a collection agent for the municipalities in the state; the telephone company collects the 911 surcharge from its customers and remits the amount collected to the municipality. Moreover, being solely a collection agent, Alaska's law provides that the Alaska Public Utilities Commission may not consider the 911 surcharge collected by a telephone company "as revenue of the local exchange telephone company." Alaska Stat. § 29.35.131(c). The Alaska law provides that the "local exchange service customer is liable for payment of the 911 surcharge in the amounts billed by the local exchange telephone company until the amounts have been paid to the telephone company." Alaska Stat. § 29.35.131(c). Alaska's law makes clear that there is no obligation on the telephone company to take legal action to enforce collection of the surcharge, and states that the "telephone company is not liable for uncollected amounts." Alaska Stat. § 29.35.131(e). Also, the telephone company is allowed to retain the greater of one percent of the collected amount or \$150 as a cost of administration for collecting the surcharge. Alaska Stat. § 29.35.131(d).

## CONCLUSION

Alaska's 911 surcharge is, therefore, a vendee tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the state. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government.

/s/ James F. Hinchman  
for Comptroller General  
of the United States